

Punishing Foreign Terrorist Fighters: New Developments in Chinese Criminal Law

Zhenjie ZHOU

Abstract

Increasing threat posed by foreign terrorist fighters, especially those in Syria and Iraq, has become a great concern of international society. Responding to resolutions of the UN Security Council, the *Ninth Amendment to the Criminal Law of People's Republic of China* timely added provisions against foreign terrorist fighters, penalizing such conducts as financing terrorism training, recruiting and transporting terrorists, organizing and actively participating in terrorism training and illegally crossing national frontiers for the purpose of participating in terrorism organizations or receiving terrorism training. The contents of these provisions present two characters, namely, punishing acts of joint offenders as separate offences and preparatory acts as perpetration, both of which demonstrates legislators' resolution to prevent foreign terrorist fighters through severe punishment. In the case in which the same act breaks two or more articles and is therefore subject to more than one charge, special provisions shall be chosen over general ones to realize the function of criminal law of alerting the public and regulating social behaviors.

Keywords: Foreign Terrorist Fighters; Counter-Terrorism; International Cooperation; Criminal Law

1. Introduction

Deeply concerned with and shocked by increasing threat of terrorism demonstrated by a serial of terrorist attacks that occurred in recent years, such as the 5/22 terrorist attack in Urumqi⁽¹⁾ and the 3/01 terrorist attack in Kunming,⁽²⁾ the *Sixteenth Session of the Standing Committee of Twelfth National People's Congress* (Standing Committee) laid heavy importance on counter-terrorism in the *Ninth Amendment to the Criminal Law of People's Republic of China* (Ninth Amendment) that became effective as of 1 November 2015. In addition to providing property-related penalties for the offence of organizing, leading and actively participating in a terrorist organization and penalizing such conducts as instigating others to commit violent terrorism activities through disseminating terrorism and extremism materials and refusing to submit evidences related to terrorism and extremism offences, the Ninth Amendment timely added provisions against Foreign Terrorist Fighters (FTFs) defined in the United Nations Security Council Resolution 2178 (2014).⁽³⁾ Furthermore, article 79 of the *Counter-Terrorism Law of People's Republic of China* (Counter-

Terrorism Law) that became effective as of 1 January 2016 confirms that those who organize, plan, prepare to implement, or carry out terrorist activities, advocate terrorism, incite the carrying out of terrorist activities and provide aid to terrorist organizations, terrorist personnel, the execution of terrorist activities or terrorist activity training should incur criminal liability. This article is intended to introduce the background of the Standing Committee adding aforementioned provisions referring to UN resolutions and related reports, analyze relevant articles in the Ninth Amendment and the Counter-Terrorism Law and discuss application principles in the case where an act breaks two or more articles at the same time.

2. The FTFs and UN Resolutions

2.1 Brief Introduction to the FTFs

The FTFs refer to 'individuals who travel to a State other than their states of residence or nationality for the purpose of perpetration, planning, or preparation or, or participation in, terrorist act or the providing or receiving terrorist training.'⁽⁴⁾ According to this definition, the FTFs can generally be categorized into those with the intention to carry out terrorist acts, and

those to participate in (receiving or providing) terrorist training. It is undoubtedly possible that an actor intends the both when traveling to his or her State of destination. Two elements must be established to punish a foreign terrorist fighter. One is the subject purpose mentioned above; the other is objective conducts of ‘leaving one’s state of residence or nationality’ or/and ‘traveling to a State of destination.’ The latter conduct usually follows the former one or, to a degree, constitutes the purpose of the former one. In other words, it is usually the case that the actor leaves his or her state of residence or nationality in order to travel to a State of destination. However, the two conducts might be separate in specific cases. For example, X, a citizen of A State, left A State to B State on a business trip. When traveling in B State, X was abetted by Y, an ISIS member, and decided to go to Iraq to participate in a terrorist attack. Judged from the standpoint of A State, X isn’t a FTF because s/he had no purpose of participating in terrorist activities when leaving A State. However, s/he is definitely a FTF when seen from the perspective of Iraq because it is for the purpose of participating in a terrorist attack that s/he traveled to Iraq.

The term ‘foreign terrorist fighters’ originated from ‘foreign fighters’, referring to individuals who have left their home countries to take part in armed conflicts. The phenomenon of foreign fighters can be traced back to as early as the Spanish Civil War in 1940s (Mendelsohn, 2011). But, it did not enter public consciousness until the end of 20th century, when a considerable number of foreigners fought with the Taliban and al-Qaeda in Afghanistan after the 9/11 terrorist attack in the U.S. in 2001, including many citizens from Western countries, such as the ‘Australian Taliban’ David Hicks and the ‘American Taliban’ John Walker Lindh (Malet, 2010). The crucial role of foreign fighters in insurgencies both during and after the U.S.-led invasion of Iraq further drew intensive international attention (Hegghammer, 2010). ‘Foreign fighters’ gradually evolved into ‘foreign terrorist fighters’ in academic publications and international documents because almost all studies on them have associated with terrorist organizations, especially the Islamic States (ISIS) and Al-Nusrah Front (ANF) in Syria and Iraq.

Although it is impossible to obtain accurate and reliable datum on the number of FTFs worldwide, an

UN report estimated that the number was between 15,000 and 20,000, with most travelling to join Islamic State in Iraq and the Levant (ISIL), while recognizing that the total could be as high as 30,000.⁽⁵⁾ The United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED) gathered official figures from States where available. According to the officially acknowledged number of the FTFs who have recently travelled to Iraq and/or the Syria, Tunisia is the biggest state of origin of the FTFs (3,000), followed by Turkey (1300), Morocco (1200), Maldives (200), Algeria (170), Malaysia (60) and Indonesia (50).⁽⁶⁾ Richard Barrett (2014) believed that there were around 12,000 foreign fighters in Syria in the first half 2014, and they had traveled from at least 81 countries. The International Centre for the Study of Radicalization and Political Violence (ICSR) located in London stated that the total number of foreign fighters in Syria and Iraq might have exceeded 20,000 in the second half of 2014, and estimated that around 19% (3850) came from the EU countries (Bakowski and Pccio, 2015).

The FTFs usually commit terrorist activities outside their countries of residence or nationality. An EU security official estimated that about 10-20 percent of fighters in Syria and Iraq from the EU countries had no intention to return, and many had even burnt their travel documents (Byman and Shapiro, 2014). However, most countries of origin still deem them a great threat and impose severe punishments on them, because it has been proven that many FTFs return to their countries of origin after receiving terrorist training, to carry out terrorist attacks, form terrorist organizations, recruit terrorists or collect funds for terrorist organizations. According to Hegghammer (2010), an estimated 1/9 foreign fighters returned to their places of residence to participate in terrorist activities, and their participation increased the possibility of successful commission of terrorist attacks. The ICSR also pointed out that about 10-30 percent foreign fighters in Syria and Iraq returned to their states of origin or stayed in states of transition and became potential security threat there (Keatinge, 2014). For example, Mohamed Merah, a 23-year-old Frenchman of Algerian descent, shot to death 3 soldiers, 3 Jewish students and a teacher in Toulouse, France, in March 2012 after receiving terrorist training in Afghanistan and Pakistan. It was estimated that 72

terrorist attacks among those occurred in France between 2014 and 2015 were related to armed conflicts in Syria.⁽⁷⁾

In order to effectively prevent similar attacks, French President Francois Hollande signed a special counter-terrorism legislation on 21 December 2012, punishing those who received terrorist training abroad with as high as 10 year imprisonment and a fine of 225,000 Euros, while authorizing legal authorities to trace terrorists using such special investigation measures as communication monitoring and phone tapping (Wu, 2015). Countries confronted with serious threat of the FTFs such as Germany, the UK, Italy, Australia, Canada and Norway have also penalized acts related to training, recruitment and transportation of the FTFs in recent years (e.g. see Bakowaski and Pccio, 2015). Meanwhile, the fact that the flow of FTFs is a transnational phenomenon makes it clear that efforts at national level, although they are necessary, are insufficient and international measures intended to coordinate national counter-terrorism legislation and activities are indispensable and the key to effective prevention and punishment of the FTFs.

2.2 UN Resolutions and Their Implementation

Due to ‘grave concern over the acute and growing threat posed by the foreign terrorist fighters’,⁽⁸⁾ the United Nations Security Council that emerged as a leading actor since the U.S. 9/11 terrorist attack adopted two resolutions to require member states to actively take criminal measures against the FTFs. One is the Resolution 2170 (2014) adopted on 15 August 2014. The resolution condemns the ‘terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international law’,⁽⁹⁾ and calls upon member states to prevent and punish recruitment of FTFs by terrorist organizations. In order to suppress the recruitment of FTFs, it requires member states to take national measures to prevent the flow of FTFs to terrorist organizations, and to sanction ‘those recruiting for or participating in the activities of ISIL, ANF and all other individuals, groups undertaking and entities associated with Al-Qaeda under the Al-Qaeda actions regime, including through financing or facilitating, for ISIL or ANF, of travel of foreign terrorist fighters.’⁽¹⁰⁾ However, the Resolution 2170 does not

present a clear definition of FTFs. Meanwhile, it indirectly confines the FTFs to those relating to particular terrorist organizations such as ISIL and ANF. As a consequence, the application scope of the resolution is restricted. Therefore, the Security Council adopted the Resolution 2178 (2014) at a high summit chaired by the U.S. president Obama on 24 September 2014. The Resolution 2178 clearly defines the FTFs, requires countries to prevent and suppress recruiting, organizing, transporting, and equipping of FTFs, and the financing of FTF travel and activities, and prevent the entry or transit of individuals believed to be traveling for terrorism-related purposes. What is more important, it requests states to adopt the legislation required to prosecute (1) their nationals and other individuals who travel or attempt to travel abroad to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training, (2) willful provision or collection of funds (by any means, direct or indirect) by their nationals or in their territories with the intention or knowledge that these funds will be used to finance the travel of FTFs, and (3) willful organization, or other facilitation, including by acts of recruitment, by their nationals or others in their territory, of FTFs.⁽¹¹⁾

Unfortunately, Surveys conducted by UN organizations show that more efforts must be made to implement aforementioned UN resolutions, either at legislative or at judicial level. For example, the CTED reviewed implementation of the Resolution 2178 and counter-terrorism legislation in 21 countries under the heaviest influence of FTFs following its adoption,⁽¹²⁾ and disappointedly found that as of May 2015, (i) few States reviewed had introduced legislation prosecuting preparatory or accessory acts conducted in the State with the aim of committing terrorist acts outside the State’s territory, and traveling or attempting to travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, both which have been identified as a high priority; (ii) only 3 of the 21 countries criminalize facilitation, including organizing, transporting and equipping, of foreign terrorist fighters’ travel. Most other countries rely on broad counter-terrorism legislation to cover that requirement. 4 States do not have measures in place to criminalize the recruitment of foreign terrorist fight-

ers, and 8 States do not have measures in place to criminalize the providing and receiving of terrorist training; (iii) The survey also revealed that providing terrorist training had been criminalized by more countries than receiving terrorist training had. This may be because the provision of terrorist training is already criminalized by states under existing regional instruments that cover that act or because the more active nature of providing training, compared with the more passive nature of receiving terrorist training, is more easily captured under broader preparatory offences and raises fewer concerns regarding respect for human rights, and (ix) only 13 of the 21 States have criminalized terrorist financing as a standalone offence, and 12 States had introduced terrorism-financing offences covering the financing of both terrorist organizations and individual terrorists.⁽¹³⁾

3. Analysis of Provisions against FTFs in the Ninth Amendment

Although the term of ‘foreign terrorist fighters’ has been rarely mentioned in academic studies, the phenomenon is definitely not new in China. As early as in 2010, public reports have revealed that terrorist activities in Xinjiang Uyghur Autonomous Region are closely associated to international terrorist organizations in Afghanistan, Palestine and Middle-Asia countries and a big number of Chinese citizens are trained there and then return to China to organize and plan terrorist activities (e.g. see Li, 2013). The report of ICSR shows that more than 300 Chinese Jihadists were fighting in Syria and Iraq in 2014 (Bakowaski and Pccio, 2015). In July 2015, more than 100 Chinese citizens, instigated and controlled by foreign terrorist organizations such as the Eastern Turkistan Islamic Movement, tried to travel to Syria and Iraq by Thailand, Indonesia and Malaysia to participate in Jihad there but failed and were sent back to China by Thailand police authorities (Jiang, 2015). Therefore, the Standing Committee timely added punishments against the FTFs in the Ninth Amendment.

3.1 Interpretation of Provisions against the FTFs

The provisions intended to prevent and punish the FTFs in the Ninth Amendment can generally be divided into four categories. The first category is those that punish terrorist recruitment. Terrorist recruitment

is usually composed of three kinds of specific acts, namely, (1) propagating and ‘legalizing’ terrorist organizations and activities, (2) sending recruitment messages and instigating others to participate in terrorist organizations or commit terrorist attacks, and (3) assistance acts such as producing and transporting propaganda materials and managing websites. Article 120a of the *Criminal Law of People’s Republic of China* (the Criminal Law) amended by article 6 of the Ninth Amendment, article 120c and article 120f of the Criminal Law added by article 7 of the Ninth Amendment have respectively criminalized recruiting and transportation of persons for any terrorist organization, terrorist activity or terrorism training, propagating terrorism or instigating terrorist activities and knowingly and illegally possessing items that propagate terrorism. In addition, organizations and individuals who disseminate recruitment messages can be charged with illegal use of information network provided in article 287a of the Criminal Law added by article 29 of the Ninth Amendment. Because disseminating terrorist recruitment messages and recruiting terrorists can be charged with forming an terrorist organization provided in article 120 of the Criminal Law⁽¹⁴⁾ and therefore falls within the scope of ‘Releasing the information for the commission of criminal activities’ in article 29 of the Ninth Amendment.

The second one is those that punish acts of organizing, participating in and financing terrorist training. Article 120b of the Criminal Law added by article 7 of the Ninth Amendment punishes organization of and active participation in terrorist training, and communication with foreign terrorist organizations or individuals for the purpose of perpetration of terrorist acts. The ‘organization of terrorist training’ here shall cover establishing and planning to establish camps and facilities for the purpose of terrorist training, dissemination of terrorist ideology and teaching skills and knowledge regarding terrorist activities, and ‘active participation in terrorist training’ shall include both providing and receiving of terrorist training according to the *Suggestions on Application of Law in Cases of Violent Terrorism and Religious Extremism* (the Suggestion) jointly issued by Supreme People’s Court, Supreme People’s Procuratorate and the Ministry of Public Security on 9 September 2014.

Article 120a of the Criminal Law includes those providing funds to individual who engages in terror-

ism or terrorist training into its coverage. Although judged from the fact that the content of terrorist training usually is disseminating terrorism ideology and teaching basic skills and knowledge regarding perpetration of terrorist activities, ‘providing funds to terrorist training’ mainly refers to providing funds to provider of terrorist training, it is completely acceptable to punish those who finance receiver of or those who intends to receive terrorist training defined in the Resolution 2178 according to the amended article 121a of the Criminal Law. On one hand, any training would be impossible without a receiver. In other words, a receiver is an indispensable constitutive element of terrorist training. On the other one, article 5 of the *Interpretation of the Supreme People’s Court on Application of Criminal Law in Cases of Money-Laundering Related Cases* issued by the Supreme People’s Court on 4 November 2009 provides that ‘financing’ refers to ‘collecting and providing funds, materials, facilities or other forms of assistance to terrorist organizations and individuals who engage in terrorist activities’. ‘Financing those who travel or plan to receive terrorist training’ can be reasonably interpreted to be included in ‘other assistance’.

Meanwhile, ‘financing individuals who engage in terrorist activities’ partly overlaps with ‘financing the FTFs’. As mentioned above, the FTFs include those who travel to a state other than their states of residence or nationality for the purpose of perpetration, planning, or preparation or, or participation in, terrorist act. According to article 6 of the Criminal Law⁽¹⁵⁾ and article 5 of the *Interpretation of the Supreme People’s Court on Application of Criminal Law in Cases of Money-Laundering-Related Cases*,⁽¹⁶⁾ X is punishable under this article since the moment s/he plans to leave China for another state for the purpose of participation in or perpetration of terrorist acts. In such a case, whoever finances X by paying for his or her accommodation or flights constitutes both an individual who finances individuals who engage in terrorism and an individual who finances the FTFs. In other words, the terrorism organizations and individuals include ‘both those in China and those abroad’ (Zhou and Zhang, 2013: 104). It should be noted here that although no punishment can be found in the Ninth Amendment for the ‘willful provision or collection of funds (by any means, direct or indirect) with the intention or knowledge that these funds will be used to finance the travel

of FTFs’ provided in the Resolution 2178, an individual perpetrates these acts can be punished as a joint offender of financing terrorist organizations, terrorist training or terrorist acts as it is for the purpose of financing that s/he provides or collects funds.

Moreover, those who willfully organize or facilitate the FTFs outside the territory of China, including by acts of recruitment provided in the Resolution 2178 can be prosecuted according to second paragraph of article 121a of the Criminal Law, because the whole conduct of organizing or recruiting can be punished in China as long as part of it was perpetrated in Chinese territory, whether or not the said terrorist act or terrorist training is actually in China according to aforementioned article 6 of the Criminal Law.

Third one is article 322 of the Criminal Law that punishes the act of illegally crossing national border (frontier). Article 30 of the Counter-Terrorism Law of PRC adopted by Chinese Legislature on 27 December 2015 authorizes organs issuing exit/entry documents, and organs conducting border inspections to deny terrorist personnel and persons suspected of terrorist activities entry or exit across border, and to not issue documents for entering or exiting the borders, or to declare their entry and exit documents cancelled. In other words, both terrorist and terrorist suspects are in principle prohibited to leave enter Chinese frontier. They therefore can only go to such as armed conflict regions as Syria and Iraq by illegal means. As a counter measure, article 40 of the Ninth amendment inserted the following part into article 322 of the Criminal Law as second paragraph: whoever, for the purpose of participating in a terrorist organization, accepting the terrorism training or carrying out any terrorist activities, illegally crosses the national border (frontier) shall be sentenced to fixed-term imprisonment of not less than one year but not more than three years and concurrently sentenced to a fine, and thereby increased both maximum and minimum punishments in the original article.⁽¹⁷⁾

Last one is article 286a of the Criminal Law added by article 28 of the Ninth Amendment that punishes internet service providers who fails to perform the obligations for security management of information networks prescribed by laws and administrative regulations and refuses to make correction as ordered by the regulatory department and thereby lead to the spread of illegal information in large amount. The

‘illegal information’ undoubtedly includes terrorism propaganda, recruitment and radicalization messages. Terrorist organizations have been proven skillful in using Internet to recruit and instigate. The United Nations Office on Drugs and Crime has pointed out as early as in 2012 that member states should take adequate legal measures to deal with increased use by terrorist organizations for recruitment and radicalization (UNODC, 2012: 3-11), and the United Nations Security Council also expressed its deep concern over the use by terrorists and their supporters of internet for terrorism-related purposes in the Resolution 2178.

In order to effectively prevent dissemination of terrorism and radicalization information through internet, it is crucial to make internet service providers play an active role. Therefore, article 286a of the Criminal law is absolutely necessary. However, it is worthy of being mentioned that the constitutive element of ‘refusing to make correction as ordered by the regulatory department’ provided in the offence may be detrimental to its practical effect. The 36th Statistics Report of Chinese Internet Development released by China Internet Network Information Center (CNNIC) on 23 July 2015 shows that the number of websites in China saw a 6.6 percentage increase in the first half of 2015 and reached 3.57 million by the end of June 2015 (CNNIC, 2015). It would be extremely hard, if not impossible, for a regulatory department to effectively monitor all these websites and timely issue a correction order. Furthermore, how to deal with websites that knowingly allow for spread of terrorism propaganda and recruitment information but the regulatory department does not timely find the illegal fact and issue a correction order is also a question that we should answer. Considering article 84 of Counter-Terrorism Law imposes administrative fines on telecommunications operators or internet service providers that do not put into place systems for network security and supervision of information content, technological security precautionary measures and thereby leads to the transmission of information with terrorist or extremist content without any precondition such as being given a correction order, this article suggests that the fact that an internet service provider refuses to make correction as ordered by the regulatory department be provided as an aggravating circumstance instead of a constitutive element. And this change can include websites that knowingly allow for spread of

terrorism propaganda and recruitment information into the scope of punishment of the aforementioned article 286a.

Briefly, the Ninth Amendment has criminalized all acts that the Resolution 2178 requires member states to punish, and the coverage of FTF-related provisions in Chinese criminal law mentioned above, although they did not appear until the second draft of the Ninth Amendment that was reviewed by the Fifth Session of the Standing Committee of Twelfth National People’s Congress is much wider than the laws against the FTFs in countries investigated by the CTED.

3.2 Characters of the New Provisions

Two characters can be easily identified in the aforementioned provisions. One is that accomplices are punished as principals. For example, recruitment or transportation of individuals for terrorist training is theoretically of assistance to organizing terrorist training, and those who perpetrated the said acts shall be punished as accomplice and given a lighter punishment than that provided in article 7 of the Ninth Amendment, or mitigated punishment or be exempted from punishment pursuant to article 27 of the Criminal Law.⁽¹⁸⁾ However, article 6 of the Ninth Amendment provides that those who recruit or transport persons for terrorist training shall be punished according to article 6 of the Ninth Amendment (assisting terrorist training), and thereby increased the maximum punishment to 15 year imprisonment. The phenomenon of accomplices being punished as principals is not rare in the Criminal Law. For instance, article 358 of the Criminal Law punishes recruiting and transporting persons for those who organize others to engage in prostitution as a separate offense instead of assistance conduct of organizing prostitution. Therefore, article 6 of the Ninth Amendment is not the first one and probably will not be the last one either.

The other is that preparatory acts are punished as perpetration. For example, crossing national border for the purpose to participate in a terrorist organization is of preparatory act of participating in terrorist organization provided in article 120 of the Criminal Law, and the perpetrator should at least be given a lighter punishment than that in the said article according to article 22 of the Criminal Law.⁽¹⁹⁾ However, article 40 of the Ninth Amendment punishes it as an aggravated cir-

cumstance of illegally crossing national border. Another example is an individual who plans to murder targeted persons for the purpose of causing public sense of terror. If s/he communicates with foreign terrorists to obtain the potential victims' information before departing China, s/he perpetrates the preparatory act of murder according to article 232 of the Criminal Law. Similarly, the newly promulgated article 120 (2) punishes communication with foreign terrorists or terrorist organizations for the purpose of perpetration of terrorist offense as completed perpetration.

Behind aforementioned characters is of course legislators' resolution to punish and prevent terrorism-related offenses with severe sanctions. At current background of both international and national counter-terrorism trends, it is completely understandable for legislators to take a serious standpoint. Moreover, this has been a common choice in western countries such as the U.S., France and the UK. For example, the UK parliament adopted the Serious Crime Act in 2007, which entered force on 6 April 2008, penalizing conducts of intentionally encouraging or assisting an offence, encouraging or assisting an offence believing it will be committed and encouraging or assisting offences believing one or more will be committed. The Act is directed at serious offences and organized crime, including terrorist crime and its essence is also to enhance punishments for crimes endangering public security through sanctioning preparatory acts as completed perpetration (Ashworth, 2009: 458-61).

However, it must be born in mind that criminal legislation against terrorism and terrorist must show due respect for international and domestic human rights law, and legal measures taken to ensure public participation in promulgation and implementation of counter-terrorism policies because, as the Geneva Academy of Humanitarian Law and Human rights (2014) concludes, 'the past decade has shown that many measures adopted for the purpose of combating terrorism can undermine the rule of law and respect for human rights,' and 'it is important to recognize that the protection of human rights and the rule of law contribute to the countering of terrorism. Arbitrary arrests, incommunicado detentions, torture and unfair trials fuel a sense of injustice and may in turn encourage terrorist recruitment, including of foreign terrorist fighters.'⁽²⁰⁾ The fact that provisions punishing the

FTFs in the Ninth Amendment lay noticeable importance on subjective elements such as the purpose to participate in a terrorist organization render it necessary for us to keep alert on their possible arbitrary application and adverse effect.

Meanwhile, article 3 of the Counter-Terrorism Law defines terrorism as 'statements and acts that create social panic, endanger public safety, violate person and property, or coerce national organs or international organizations, through methods such violence, destruction, intimidation, so as to achieve their political, ideological, or other objectives.' The wording 'statements' here is misleading and gives the impression that those who make any speeches showing sympathy to or supporting political or religious appeals of a terrorist organization may be punished. However, as far as the Criminal Law is concerned, it is not the case. On one hand, article 13 of the Criminal Law clearly requires that a crime must be 'an act' that endangers the State, the society or citizens. A statement is not 'an act' and not potential to endanger anything as long as it does not abet or instigate others to commit any specific offences in the Special Part of Criminal Law. On the other one, it is a fundamental principle in criminal theory that pure thoughts and ideas should not be punished, in other words, 'the dangerous acts in criminal law exclude those that express thoughts in principle' (Qu, 2004: 121). Therefore, necessary clarifications should be made in implementation guidelines to ensure due respect for the freedom of speech guaranteed by article 35 of the Constitution of People's Republic of China.

4. Application Principle in the Case Where an Act Breaks Two or More Articles

Prior to the adoption of the Ninth Amendment, the Suggestion jointly issued by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security had laid down detailed instructions on investigation and prosecution of organizing, leading and participating in terrorist organizations and financing terrorist activities. Judged from its contents, the Suggestions have covered the majority of conducts that the Resolution 2178 required member states to penalize. As a consequence, it will be often seen that a terrorism-related act breaks two or more articles in judicial practice. For example, (i) ille-

gally crossing national border for the purpose of receiving terrorist training abroad constitutes participation in terrorist organization according to the Suggestions, and aggravated circumstance of illegal crossing national border (frontier) according to article 40 of the Ninth Amendment, (ii) providing training to terrorists breaks both article 120 of the Criminal Law (organizing and leading terrorist organization), and article 7 of the Ninth Amendment (organizing terrorist training), and (iii) transporting individuals for terrorism-related purposes can be charged with illegally transporting others to cross national borders provided in article 321 of the Criminal Law, or transporting individuals for terrorist organizations or for the purpose of perpetration of terrorist acts or providing or receiving terrorist training.

It is usual in common law countries for a defendant to be charged with two or more offences for one act that breaks several articles in the same law or different ones, for example, Michael Wilson was charged with both murder and attempted murder by Memphis police, the U.S., for his shooting during a robbery that resulted in both death and injury in September 2015 (Jones, 2015). However, it is a principle that the prosecutor files only one charge against one act in the same criminal case in China unless the Criminal Law provides otherwise. For example, second paragraph of article 157 of the Criminal Law punishes those who resist the seizure of smuggled goods by means of violence or threat under two charges, namely, a smuggling-related offence provided in a corresponding article of Section 2 of Chapter 3 of the Criminal Law, and preventing State functionaries from performing their duties stipulated in article 277 of the Criminal Law, although the act of resisting the seizure of smuggled goods by means of violence or threat is in theory considered and should be charged as a part of the act of smuggling. Another suitable example is second paragraph of article 253 of the Criminal Law. According to the paragraph, a postal worker who steals money or property by committing the crime mentioned in the preceding paragraph (opening without authorization or concealing or destroying mail or telegrams) shall be convicted of theft provided in article 164 of the Criminal Law and given a heavier punishment.

Then, according to what principle shall the prosecutor chose a charge, for example, in aforementioned cases, as neither of the above terrorism-related articles

provides a special rule as article 157 or article 253 of the Criminal does? Theoretically, two principles can be applied in the case where an act breaks two or more articles in the Criminal Law. One prioritizes special provisions and the other provisions that impose relatively heavy punishments (e.g. see Gao and Ma, 2011:186-7). These two principles seems enough clear and easy to apply at first glance. But it has long been debated that which one should be chosen over the other one in the case where a special provision provides relatively light punishment or a provision imposing relatively heavy punishments is not a special one (e.g. see Huang and Chen, 2007)

In the case of the FTFs, it is rational to choose provisions in the Ninth Amendment over those of the Criminal Law as the former is both newly added and special ones. If the punishments provided in the former are heavier than those in the latter, to apply the principle of special provisions being prioritized may lead to no dispute. However, if it was the latter that provides heavier punishments, it might be held that general provisions should be chosen over the new ones so as to realize legislators' intention to prevent the FTFs through relatively severe punishment. For example, in the case where X illegally crossed national border for the purpose of receiving terrorist training three times or more, s/he could be sentenced to a maximum punishment of 3 year imprisonment combined with fine according to article 40 of the Ninth Amendment, while s/he could possibly be sentenced to 10 year imprisonment if charged with actively participating in terrorist organizations provided in article 120 of the Criminal Law.

Therefore, it is not unreasonable to insist that the principle of provisions that provide relatively heavy punishments being prioritized shall be applied in all cases where the FTFs are involved, and this might be the reason that last paragraph of article 7 of the Ninth Amendment states that 'where the acts provided in previous paragraphs constitutes other crimes, they should be punished according to provision providing heavier punishments'. According to this paragraph, for example, a leader of an terrorist organization who organized individuals that s/he recruited to illegally cross national borders for the purpose to participate in terrorist training and thereby caused death to the organized shall be convicted of organizing others to illegally cross national borders provided in article 318

of the Criminal Law because s/he could be sentenced to more than 7 year imprisonment or life imprisonment combined with fine or confiscation of property if convicted, while the punishment provided in article 120 (2) of the Ninth Amendment is more than 5 year imprisonment or life imprisonment. The former is obviously more severe than the latter, not only because of the minimum punishment but also because of the supplementary penalties. Then, shall we, referring to the last paragraph of article 7 of the Ninth Amendment, apply the principle of provisions providing heavier punishment being prioritized in all cases where a terrorism-related act breaks more than one article and punishments in special laws are lighter than those in general law?

It should be admitted that this principle could better demonstrate legislators' serious stance. However, the principle of special provisions being prioritized shall be applied from the perspective of better regulation of social behavior as long as the law doesn't provide otherwise, especially in the case of newly created crimes. To control and regulate social behaviors is one of the most important functions of criminal law, that is, 'criminal law shall regulate behaviors of members of a given community in advance through proclaiming consequences of illicit behaviors, which are demonstrated in the punishments imposed on those who break the law' (Yamanaka, 2008:16). In other words, criminal law denounces certain acts by providing them to be crimes and orders members of the community to refrain themselves from committing any prohibited acts. Obviously, the precondition to realization of this function is that members of the community are fully aware and understand the criminal norms and are able to make free choices following them. Compared to general provisions, special provisions are designed to punish those acts or affairs legislators intend to stress, and highlight them more sharply. Prosecuting and convicting the FTFs in accordance with special provisions in the Ninth Amendment is helpful in disseminating legislative intention to the public more vividly through particular examples and make criminal norms better understood and accepted into public conscience in practice. If we convicted the aforementioned leader who organized terrorists s/he recruited to illegally cross national border with national border-related crimes, we, while imposing heavier punishments on him on her, would render spe-

cial provisions in the Ninth Amendment meaningless and undercut public recognition and understanding in relation to the FTFs.

Meanwhile, it should be noted that articles that provide heavier punishments do not necessarily lead to heavier sentencing, because the people's court will make discretionary adjustments on the basis of proven subjective and objective circumstances. Applying special provisions sometimes may better realize legislators' intent to prevent terrorism crimes by severe punishment. For example, in the case of illegally crossing national border to participate in terrorist training, the defendant can be punished according to article 120 of the Criminal Law (organizing, leading and participating terrorist organizations), the maximum punishment of which is 10 year imprisonment, or article 40 of the Ninth Amendment with a maximum punishment of 3 year imprisonment. Apparently, as for legally provided punishments, the former is much heavier than the latter. However, if the actor was abetted to cross national border to participate in terrorist training for the very first time, s/he could be sentenced to 'imprisonment of more than 1 year less than 3 years combined with fine' according to the latter, and 'imprisonment less than 3 years, criminal detention, public surveillance and deprivation of political rights' as 'other participants' defined in the former. Although the maximum punishments are both 3 year imprisonment, the minimum punishment in the latter is only 1 year imprisonment combined with fine, which is obviously heavier than the former.

Conclusion

The task of preventing the FTFs cannot be accomplished at one stroke. Therefore, counter-terrorism policies and laws must be adjusted timely corresponding to changes in practice. For example, terrorist organizations prior to ISIS needed to collect funds from outside so as to support their terrorist acts. On the contrary, ISIS and ANF can obtain huge wealth from oil wells they control and are financially capable of paying for the travel to the country of destination, daily living expenses, training and equipment of the FTFs. According to officials of a State reviewed by the CTED, foreign recruiters in their territory have persuaded its citizens to join ISIS with promises of financial reward in the Syrian Aral Republic.⁽²¹⁾ This new change undoubtedly renders it necessary to pro-

mote international cooperation in anti-money laundry matters. Another example is the ‘broken travel’, a new evasive travel strategy to ‘break long-distance travel into multiple segments such that it becomes difficult to ascertain travel history and travel origin, to prevent border authorities and counter-terrorism officials from accurately determining where they were prior to their arrival in a particular State’.⁽²²⁾ As a consequence, it is critical to prevention of transnational flow of the FTFs to effectively cope with broken travel by enhancing capacity of border authorities and counter-terrorism officials to exchange and analyze travelers’ information. Unfortunately, international community has not taken efficient steps to correspond to this challenge yet.

Becoming aware of the danger and harm the FTFs may cause, Chinese legislature added aforementioned provisions in the second draft of the Ninth Amendment to the Criminal Law of PRC reviewed in June 2015. Criminal legislation is no more than the first step of a long march. This may be the reason that EU documents are suggesting member states adopt both criminal measures and administrative measures such as deprivation of citizenship, restrictions on travel and EU Passengers Name Record (Bakowski and Pccio, 2015). In the future, China shall construct a comprehensive policy to prevent transnational flow of the FTFs within the framework of the newly adopted Counter-Terrorism Law too.

NOTE

- (1) In the early morning of 22 May 2014, two SUVs slammed into shoppers gathered at the market in Urumqi, Capital City of Xinjiang Uygur Autonomous Region and then exploded. At least 31 were killed and more than 90 wounded in the attack.
- (2) Around 21:20 at the night of March 1, 2014, more than 10 masked assailants with knives wearing the same outfits hacked innocent people at the square, the booking halls, and other locations at Yunnan Kunming Train Station. The violent incident caused at least 29 deaths and 113 injuries.
- (3) S/RES/2178 (2014).
- (4) S/RES/2178 (2014), preface.
- (5) S/2014/815, para. 14.
- (6) S/2015/338, para.18.
- (7) S/2015/123, para15.
- (8) S/RES/2178 (2014).
- (9) S/RES/2170 (2014).
- (10) S/RES/2170 (2014).
- (11) S/RES/2178 (2014).
- (12) All these 21 countries are the main countries of origin,

transfer or target, including Afghanistan, Algeria, Albania, Bosnia and Herzegovina, Egypt, India, Indonesia, Jordan, Lebanon, Libya, Malaysia, Maldives, Mali, Morocco, Nigeria, Palestine, the Philippines, Qatar, Saudi Arabia, Tunisia and Turkey.

- (13) S/2015/338.
- (14) the *Suggestions on Application of Law in Cases of Violent Terrorism and Religious Extremism* jointly issued by Supreme People’s Court, Supreme People’s Procuratorate and the Ministry of Public Security on 9 September 2014 provides that “forming a terrorist organization” includes recruiting terrorists.
- (15) The article provides that if a criminal act or its consequence takes place within the territory or territorial waters or space of the People’s Republic of China, the crime shall be deemed to have been committed within the territory and territorial waters and space of the People’s Republic of China.
- (16) The article provides that individuals who engage in terrorist activities refer to anyone who plans to, makes preparations for and perpetrates terrorist acts.
- (17) The original article provides that whoever, in violation of the laws or regulations on administration of the national border (frontier), illegally crosses the national border (frontier), if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than one year, criminal detention or public surveillance and concurrently sentenced to a fine. It contains no aggravating circumstances.
- (18) The article provides that an accomplice refers to any person who plays a secondary or auxiliary role in a joint crime. An accomplice shall be given a lighter or mitigated punishment or be exempted from punishment.
- (19) The article provides that an offender who prepares for a crime may, in comparison with one who completes the crime, be given a lighter or mitigated punishment or be exempted from punishment.
- (20) S/2015/338, p15.
- (21) S/2015/338, p.27.
- (22) S/2015/338, p.16.

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